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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 CUNG LE, et al.,

Case No. 2:15-cv-01045-RFB-PAL

8 Plaintiffs,

**ORDER**

9 v.

(Mot Challenge Designation  
ECF Nos. 281/282)

10 ZUFFA, LLC, et al.,

11 Defendants.

12 Before the court is Plaintiffs' Motion to Challenge Work Product Designation (ECF No.  
13 281 filed under seal, and the redacted version (ECF No. 282) filed on the public record. The court  
14 has considered the motion, Zuffa's Opposition (ECF Nos. 294/295), numerous related filings<sup>1</sup>, and  
15 the arguments of counsel at the hearing on this matter.

16 **BACKGROUND**

17 **I. The Amended Complaint and Procedural History**

18 Plaintiffs filed their Consolidated Amended Antitrust Class Action Complaint (Dkt. #208)  
19 on December 18, 2015. It is a civil antitrust action under Section 2 of the Sherman Act, 15 U.S.C.  
20 § 2, for treble damages and other relief arising out of allegations of Zuffa's anti-competitive  
21 scheme to maintain and enhance a monopoly power in the market for promotion of live elite  
22 professional Mixed Martial Arts ("MMA") fighter bouts and monopsony power of the market for  
23 live elite professional MMA fighter services. The named Plaintiffs bring suit on behalf of  
24 themselves and a putative class of others similarly situated under Rule 23 of the Federal Rules of  
25 Civil Procedure against Zuffa, operating under the trademark Ultimate Fighting Championship or

26  
27 <sup>1</sup> The papers in this case were filed in a confusing fashion and were not linked by docket numbers. Rather  
28 than list all of the docket numbers concerning matters filed on the public record, and matters filed under  
seal and redacted, the court assures the parties it has reviewed all of the moving and responsive papers  
pertinent to this motion.

1 “UFC”. Plaintiffs claim that the UFC has engaged in an illegal scheme to eliminate competition  
2 from would-be MMA promoters by systematically preventing them from gaining access to  
3 resources critical to successful MMA promotions, including by imposing extreme restrictions on  
4 UFC fighters’ ability to fight for would-be rivals during and after their tenure with the UFC. The  
5 amended complaint claims that as part of its scheme, UFC controls not only fighter careers, but  
6 also takes and expropriates the rights to their names and likeliness in perpetuity. As a result of this  
7 conduct, UFC fighters are paid a fraction of what they would earn in a competitive marketplace.

## 8 **II. The Parties’ Dispute**

### 9 **A. Plaintiff’s Motion to Challenge Work Product Designation**

10 In the current motion, the plaintiffs challenge defendant Zuffa’s designation of three  
11 documents produced in discovery in this case as covered by the work product privilege. Zuffa  
12 Bates-stamped and produced the three documents at issue in response to plaintiffs’ Request for  
13 Production of Document No. 23 seeking documents analyzing the effect of contractual terms on  
14 fighter compensation or on Zuffa’s strategies, revenues and profitability. However, it subsequently  
15 sought to claw back the documents asserting they are entitled to work product protection.

16 The three documents at issue involve a proposal by a third-party human resources  
17 consultant, Mercer (U.S.) Inc. (“Mercer”) to produce a “fighter pay assessment”, the stated  
18 objective of which was to “guide future compensation and benefits program design, including  
19 fighter pay (base and incentives) and benefit levels.”

20 In response to plaintiff’s Request for Production No. 23, Zuffa produced six documents or  
21 communications relating to the Mercer fighter pay assessment, including the three documents now  
22 in dispute. Two of the three challenged documents were created by Mercer, and the third is an  
23 email chain between Zuffa’s Chief Legal Officer, Kirk Hendrick, and William Hunter Campbell,  
24 an attorney at Campbell & Williams, outside counsel for Zuffa. The email chain attaches one of  
25 the Mercer documents, and discusses setting up a telephone call with outside consultants.

26 After the documents were produced in discovery, plaintiffs served Zuffa with a Rule  
27 30(b)(6) notice on July 5, 2016 requesting deposition testimony about the work done by Mercer  
28 as a category and citing the statement of work by Bates number that Zuffa produced. On July 28,

1 2016, plaintiffs provided notice to Zuffa pursuant to Fed. R. Civ. P. 45(a)(4) that plaintiffs intended  
2 to serve a subpoena duces tecum on Mercer. The subpoena was served on Mercer July 29, 2016.  
3 To date, Mercer has not produced responsive documents and Zuffa has not objected to the  
4 subpoena. On August 8, 2016, plaintiffs served a Second Request for Production of Documents  
5 on Zuffa asking for all documents and communications concerning Zuffa's engagement of Mercer  
6 in connection with the "Fighter Pay Program Review and Design," as well as communications  
7 with Mercer, documents and information provided to Mercer, Mercer's findings and Zuffa's  
8 response to Mercer's findings.

9 On August 19, 2016, Zuffa sent plaintiffs a letter stating that they were clawing back the  
10 three documents at issue in this motion as attorney work product. Plaintiffs notified Zuffa of their  
11 intent to challenge the designation and this motion was filed. Although Zuffa has claimed work  
12 product protection for the 3 documents in dispute it has not attempted to claw back the Mercer  
13 statement of work for the fighter pay assessment project.

14 Plaintiffs claim that the challenged documents consist of documents directly related to the  
15 August 8, 2013 statement of work Bates-stamped ZFL-1007379 which Zuffa has not clawed back,  
16 which references an engagement letter of March 8, 2013. Plaintiffs argue that the challenged  
17 documents pertain to a project which was originally contemplated and commenced in March 2013,  
18 more than 21 months prior to the filing of the first complaint in this case. The first document is a  
19 memorandum by Cathy Shepard, a non-attorney employee of Mercer, dated September 27, 2013.  
20 It seeks documents and information that Mercer intended to use to develop a "fighter pay  
21 assessment" for Zuffa and specifies the documents requested. Nothing on the face of the document  
22 indicates that it was prepared in anticipation of litigation or involved an attorney. No attorneys or  
23 litigation are referenced, nor are any legal concepts or strategies discussed.

24 The second document challenged is an email Bates-stamped ZFL-1824835. The Mercer  
25 (Shepard) memo was attached to this document which consists of an email chain between Mr.  
26 Hendrick and Mr. Campbell between September 30th and October 1st, 2013, to schedule a call  
27 "with some outside consultants."  
28

1           The third document is a Mercer presentation Bates-stamped ZFL-0557588. It is a draft  
2 presentation entitled “Fighter Pay/Project Update and Methodology Discussion” dated March 18,  
3 2014. The presentation is a status report on the progress of the fighter pay assessment project,  
4 along with a summary of the methodology to be used and a list of the next steps for the project.  
5 The presentation discusses a comparator group of other sports organizations including NASCAR,  
6 MLB, the NBA, and the NHL whose compensation practices Mercer proposed to study to “provide  
7 an external basis for understanding how UFC’s fighter pay structure and practices compares to  
8 similar companies.”

9           Plaintiffs argue that Mercer is a human resources consulting company that describes itself  
10 as a “global consulting leader in health, retirement, investments, and talent,” and offers HR  
11 solutions for companies including “compensation data to benchmark your organization against  
12 others....” The statement of work for the fighter pay assessment indicates that Mercer analyzed  
13 Zuffa’s information and compared it to compensation practices in the comparator groups to assess  
14 Zuffa’s current compensation model and make recommendations for the future. The goal of the  
15 project was to “not only help test the alignment of current fighter compensation and benefits  
16 practices against UFC strategies and market practices, but also identify potential opportunities for  
17 change.”

18           Plaintiffs contend that none of the documents at issue in this motion qualify as work  
19 product. Fighter compensation is at the heart of the plaintiffs’ claims against Zuffa. The amended  
20 complaint alleges that Zuffa suppressed compensation for elite professional MMA fighters by  
21 using its monopoly and monopsony power. The challenged documents concern compensation to  
22 be paid to UFC fighters. The materials consist of a survey of compensation for UFC fighters, and  
23 includes a number of comparisons between pay for UFC fighters and other professional athletes.

24           Citing *In re Grand Jury Subpoena*, 357 F.3d 900, 908 (9th Cir. 2003), plaintiffs argue the  
25 documents do not meet the Ninth Circuit standard to qualify as work product. The Ninth Circuit  
26 has adopted a “because of” standard that requires consideration of the totality of the circumstances  
27 and affords work product protection only when it can fairly be said that the documents were created  
28 because of anticipated litigation, and would not have been created in substantially similar form but

1 for the prospect of litigation. Plaintiffs cite district court decisions holding that documents  
2 prepared in the ordinary course of business, or that would have been created in essentially the  
3 similar form irrespective of litigation, are not work product documents. Plaintiffs cite *Ooida Risk*  
4 *Retention Grp., Inc. v. Bordeaux*, 2016 U.S. Dist. LEXIS 12851, at \*3 (D. Nev. February 3, 2016)  
5 for the proposition that “documents generated in the ordinary course of business are generally not  
6 protected under the work product doctrine, even if produced at a time when litigation was  
7 anticipated.” Documents are not work product simply because litigation “is in the air or there is a  
8 remote possibility of some future litigation.”

9         Zuffa bears the burden of demonstrating the work product doctrine applies. Consulting  
10 work performed by a third party cannot be work product if it is the type of work routinely done on  
11 behalf of a company. In this case, all three of the documents are routine business communications  
12 related to fighter pay assessment. The Mercer memo itself concerns materials Mercer asked for to  
13 assess fighter pay and was not written by a lawyer. The memo provides a quote for the proposed  
14 services, describes Mercer employees who would be doing the work, and a describes the work to  
15 be done. The email chain between Zuffa’s general counsel, Kirk Hendrick, and outside counsel,  
16 William Hunter Campbell, was created 15 months before the complaint in this case was filed, and  
17 does nothing more than transmit a memo and make arrangements for a telephone call for a purely  
18 business purpose. The Mercer presentation was created by Mercer employees, not lawyers, in  
19 approximately March 2014, nine months before the complaint in this case was filed. The  
20 presentation itself shows that Mercer was creating a human resources document pertaining to  
21 employee compensation, an ordinary business activity, that was to be used for business purposes.  
22 Nothing in the documents contain legal analysis or reflects that they were prepared in anticipation  
23 of litigation. In attempting to claw back the documents, Zuffa has not identified any potential or  
24 actual litigation that was related to the challenged documents. Assuming *arguendo* that the  
25 challenged documents were created as part of Zuffa’s internal investigation of its compensation  
26 policies, the documents are so devoid of any reference to the threat of litigation that Zuffa’s *post*  
27 *hoc* rationale should be rejected as insufficient.

1 Plaintiffs argue, in the alternative, that if the court determines the documents are covered  
2 by the work product doctrine, plaintiffs have shown substantial need for the documents and that  
3 they would suffer undue hardship if the documents are not produced because the documents are  
4 not available from another source.

5 The case law distinguishes between two types of work product which are subject to two  
6 different standards for discovery. Ordinary work product includes raw factual information, while  
7 opinion work product includes the mental impressions, conclusions, opinions, or legal theories of  
8 an attorney or representative concerning litigation. The plaintiffs should be permitted to discover  
9 ordinary work product consisting of factual materials on a showing of substantial need if plaintiffs  
10 “cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ.  
11 P. 26(b)(3). This is determined on a case-by-case basis. In this case, plaintiffs have alleged that  
12 Zuffa suppressed compensation for the plaintiffs and the putative class. Fighter compensation is  
13 a central issue in this case and plaintiffs seek to prove that UFC fighter compensation is  
14 inordinately low when compared to compensation to athletes in other sports. The fighter pay  
15 assessment Mercer performed addresses this allegation directly. Plaintiffs are aware of no other  
16 documents that make the comparison and analysis contained in the fighter pay assessment. The  
17 court should therefore order that the documents be produced as plaintiffs have established  
18 substantial need for them and that they cannot obtain the substantial equivalent by other means.

19 In the alternative, plaintiffs argue Zuffa has waived work product protection for the  
20 documents because it produced other documents relating to the Mercer fight pay assessment.  
21 Thus, even if the documents were protected by work product privilege, Zuffa has waived the  
22 protection by selectively disclosing certain privileged materials, while selectively withholding  
23 others, presumably to mislead the plaintiffs and gain an advantage. Plaintiffs contend that at a  
24 minimum, the scope of the waiver includes each of the challenged documents as well as any other  
25 documents containing the facts and materials on which Mercer relied in conducting its fighter pay  
26 assessment and any documents containing or disclosing Mercer’s findings and recommendations  
27 in connection with the fighter pay assessment.  
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1 To support its waiver arguments, the plaintiffs assert that Zuffa produced several  
2 documents related to the fighter pay assessment including the three challenged documents and the  
3 statement of work which it is not attempting to claw back. The Mercer presentation was produced  
4 March 24, 2016. The statement of work was produced May 18, 2016, and the memo and email  
5 chain were produced on July 11, 2016. Plaintiffs put Zuffa on notice that they possessed and  
6 intended to use the statement of work on July 5, 2016, when plaintiffs referred to it by Bates  
7 number and title in the Rule 30(b)(6) notice of deposition plaintiffs served. The parties had a meet-  
8 and-confer telephone conference on July 26, 2016, to discuss the topics in the July 5th notice.  
9 Zuffa raised certain privilege issues implicated by other topics, but did not raise any potential  
10 issues related to the Mercer fighter pay assessment or statement of work.

11 On August 3, 2016, plaintiff served a revised Rule 30(b)(6) notice which again specifically  
12 referenced the Mercer statement of work by Bates number and title. Another meet-and-confer call  
13 was conducted August 12, 2016, to discuss the notice. Zuffa failed to raise any work product  
14 issues related to the statement of work. On August 8, 2016, plaintiffs served their Second Set of  
15 Requests for Production of Documents which specifically requested documents related to the  
16 fighter pay assessment performed by Mercer. A meet and confer was conducted August 25, 2016  
17 to discuss the Second Set of Requests for Production of Documents, but Zuffa did not raise any  
18 work product issues with respect to the statement of work. However, Zuffa's August 19, 2016  
19 letter clawed back the Mercer memo, the email chain, and presentation, but not the statement of  
20 work. Having provided the statement of work to plaintiffs, Zuffa has waived the right to assert  
21 work product protection for the memo and presentation which addresses the same subject matter,  
22 any other documents containing the facts and materials on which Mercer relied in conducting the  
23 fighter pay assessment, and any documents containing or disclosing Mercer's findings and  
24 recommendations in connection with its fighter pay assessment.

25 Zuffa therefore seeks an order granting its challenge to work product designation of the  
26 three challenged documents and compelling production of related materials.

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1           **B. Zuffa's Opposition**

2           Zuffa's Opposition asserts that plaintiffs' motion is based on two incorrect assumptions:  
3 first, that Zuffa engaged Mercer to perform a fighter pay study; and second, that the resulting study  
4 was performed in anticipation of this litigation. Zuffa's motion, which is supported by the  
5 declarations of outside counsel, William Hunter Campbell, Zuffa's Vice President and Chief Legal  
6 Officer, Kirk Hendrick , and outside counsel Stacey Grigsby, maintains that Zuffa did not execute  
7 the Mercer statement of work that Zuffa produced in this case.

8           The response represents that Zuffa's outside counsel commissioned Mercer to conduct a  
9 study related to fighter pay after Zuffa became embroiled in litigation involving fighter Eddie  
10 Alvarez in a federal lawsuit filed in January 2013 by rival MMA promotor, Bellator, in the District  
11 of New Jersey. The Alvarez litigation sparked intense scrutiny of Zuffa's contracts with fighters  
12 and their compensation which led several fighters to make public statements that Zuffa did not pay  
13 its fighters fairly, and claims that Zuffa's contracts were unenforceable. To assess Zuffa's  
14 exposure in the Alvarez litigation and "attendant allegations" from fighters regarding their  
15 compensation, Zuffa's outside law firm, Campbell & Williams, hired Mercer to conduct the study  
16 which would assist the firm in advising Zuffa on the actual and threatened litigation.

17           Zuffa maintains that the challenged documents relate to a fighter compensation study that  
18 Campbell & Williams commissioned in anticipated litigation, and are therefore protected by the  
19 work product doctrine. Bellator filed a federal complaint in the District of New Jersey against its  
20 former fighter Eddie Alvarez involving the contract disputes among them. Bellator's suit named  
21 Alvarez and five Doe defendants. A claim for tortious interference with the parties' contract was  
22 asserted against the Doe defendants. Alvarez's negotiations with Zuffa, and Zuffa's subsequent  
23 offer to him were central to the Alvarez litigation. Thus, although Zuffa was not named as a party  
24 in the lawsuit, its outside counsel believed there was a high likelihood that Zuffa could be named  
25 in the lawsuit as one of the Doe defendants.

26           Campbell & Williams had "a number of interactions" with Bellator's counsel regarding  
27 the litigation that "subjectively and objectively made litigation with Bellator over Mr. Alvarez a  
28 reasonably foreseeable possibility." Bellator served Zuffa with a broad subpoena for 11 categories



1 of documents regarding a number of aspects of Zuffa's business, and efforts to resolve the  
2 subpoena disputes were "quite contentious."

3 Zuffa sent a litigation hold letter to certain Zuffa employees, at the request of Campbell &  
4 Williams, to preserve documents for the Alvarez litigation in May 2013. The Bellator/Alvarez  
5 case settled in August 2013. However, Zuffa continued to anticipate potential litigation with  
6 Bellator over Alvarez because the terms of the Bellator/Alvarez settlement provided, *inter alia*,  
7 that Alvarez would fight one more bout for Bellator before being able to negotiate with Zuffa and  
8 others for his services. This agreement contained a unique clause that required Bellator to sign off  
9 on a confidentiality provision in Bellator's favor before Alvarez could negotiate with others. This  
10 clause later proved problematic and contentious when the parties could not agree on mutually  
11 satisfactory language which heightened the concern for potential litigation.

12 Bellator also attached an unredacted version of the entire proffered contract between Zuffa  
13 and Alvarez to its New Jersey complaint, which Zuffa maintained was a confidential document.  
14 This brought a substantial amount of media attention and increased scrutiny and controversy over  
15 fighter contracts and compensation. The publication of Zuffa's contract led to a number of  
16 questions and publications regarding fighter pay and the enforceability of Zuffa contract  
17 provisions. Fighters began to speak up publicly about these issues, and numerous individuals  
18 began to question Zuffa's compensation practices.

19 Thus, outside counsel reasonably anticipated litigation with Bellator over potential  
20 interference with contract claims, and also had significant concerns that other fighters might file  
21 suit regarding issues of fighter pay and the enforceability of Zuffa's contracts. As a result, in  
22 September 2013, Campbell & Williams requested that Mercer conduct a fighter pay assessment  
23 study. The firm was familiar with Mercer because it had previously conducted an employee  
24 compensation study for Zuffa unrelated to fighter compensation. Mercer pitched another project  
25 to Zuffa in August 2013 after the March study was completed. Zuffa did not believe it had a  
26 business purpose significant enough to warrant the commission of this type of assessment and  
27 decided not to engage Mercer to conduct the proposed fighter pay program review and design.  
28 However, as legal advisors to Zuffa, Campbell & Williams recognized that an analysis of fighter

1 compensation could assist the firm in defending Zuffa in any litigation with Bellator or other  
2 fighters. Thus, in September 2013, Campbell & Williams retained Mercer to conduct a fighter pay  
3 study. Zuffa maintains that if the law firm had not anticipated the Alvarez litigation and other  
4 related litigations regarding Zuffa's contracts and fighter pay, the study would not have been  
5 commissioned. Counsel also represent that a final version of the fighter pay assessment was never  
6 completed, in part, because of concerns about Mercer's methodology.

7 This lawsuit was filed well over a year after Campbell & Williams retained Mercer. In  
8 July 2016, plaintiffs served a 56 topic Rule 30(b)(6) deposition notice which included a single  
9 topic on Zuffa's purported retention of Mercer citing the unexecuted statement of work that Mercer  
10 sent to Zuffa. Zuffa does not claim the statement of work is attorney work product because it is  
11 nothing more than a rejected business proposal, and therefore, did not believe it necessary to claw  
12 back the document. However, as Ms. Grigsby began to prepare for the Rule 30(b)(6) deposition,  
13 she learned that Campbell & Williams had retained Mercer to conduct a similar study in  
14 anticipation of litigation. Out of an abundance of caution, Zuffa's counsel searched its voluminous  
15 document productions and discovered that three of the Campbell & Williams' documents had been  
16 inadvertently produced. Counsel for Zuffa therefore sent Plaintiffs a letter advising them of the  
17 inadvertent production pursuant to the claw back provision of the protective order entered in this  
18 case. Counsel for plaintiffs, Kevin Rayhill, responded to the claw back letter indicating plaintiffs  
19 intended to challenge the designation of work product for the three documents, but did not request  
20 a meet and confer before filing the motion.

21 The response argues that the challenged documents are work product because they were  
22 created as a result of the real and substantial threat of being sued in the Alvarez litigation and  
23 potential other litigation regarding Zuffa's fighter pay and "other issues regarding its contract."  
24 The core of the work product doctrine shelters the mental processes of the attorney. It is an  
25 intensely practical doctrine grounded in the realities of litigation that recognizes attorneys often  
26 rely on the assistance of investigators and other agents in the compilation of materials in  
27 preparation for trial. The work product doctrine protects the collection of facts if presented in such  
28 a way that it discloses counsel's mental impressions. In this case, the Mercer fighter pay and

1 assessment study was done “precisely and only because of the threat of imminent litigation.”  
2 Outside counsel decided to engage a third-party consultant to look into issues regarding Zuffa’s  
3 fighter pay, and more generally, the structure of compensation and benefits paid to athletes in a  
4 variety of sports to prepare for the anticipated litigation and devise a legal strategy for handling  
5 this issue in foreseeable litigation. The documents therefore fall squarely within the parameters of  
6 the work product protection.

7         The documents at issue satisfy both the temporal and motivational component of the  
8 anticipation of litigation requirement. In September 2013, Zuffa had just emerged from the first  
9 round of the Alvarez litigation and “rightly perceived that this dispute would continue after  
10 Alvarez and Bellator reached a settlement.” In addition, because Bellator publicized the  
11 confidential contract Zuffa offered to Alvarez which resulted in “a very public conversation about  
12 the propriety of Zuffa’s contracts and fighter compensation” the law firm had a reasonable  
13 subjective belief of anticipated litigation. Bellator’s refusal to agree upon the language for a  
14 confidentiality agreement for negotiations with Alvarez led to accusations that there had been a  
15 breach of the contract and interference with the contract. Mr. Campbell and others at his firm  
16 began to receive inquiries from fighters and their agents as well as reporters regarding issues of  
17 fighter pay and Zuffa’s contract after public disclosure. Thus, the law firm also had an objectively  
18 reasonable belief “in light of the tenor of the situation at the time that his firm engaged Mercer”  
19 that litigation was reasonably foreseeable. The work product doctrine does not require that  
20 materials be created after litigation is filed, only where litigation is reasonably foreseeable.

21         Zuffa argues that plaintiffs have not and cannot show a substantial need for the challenged  
22 documents because plaintiffs could obtain the information from easily available public sources.  
23 As the Mercer proposal makes clear, Mercer planned to use financial information from a variety  
24 of public sources for its analysis of other sports organizations’ compensation and benefits for its  
25 proposed study. The proposed comparator group information is publicly available for plaintiffs to  
26 access in a simple internet search of various websites identified in the opposition. Additionally,  
27 Zuffa has already produced all of the financial data that it could have produced to Mercer including  
28 detailed information regarding fighter event and non-event pay, sponsorship payments, and

1 merchandise payments. Thus, plaintiffs have all the information they need to conduct their own  
2 comparison of Zuffa's fighter pay to other sports organizations and cannot show that their need  
3 for this information overcomes the work product protection for these documents. To find  
4 otherwise would constitute an inappropriate exploitation of Zuffa's efforts in preparing for  
5 litigation.

6 Zuffa also maintains that the documents are not relevant to this case because plaintiffs have  
7 alleged a market that is limited to MMA fighters and the promotion of MMA events, and that  
8 Zuffa has suppressed compensation of MMA fighters. A study comparing fighter pay and  
9 compensation between Zuffa and other unrelated sports is therefore irrelevant to plaintiffs' claims  
10 that Zuffa suppressed fighter compensation in the MMA market. Additionally, the substantial  
11 differences between MMA and other sports in terms of revenues, costs, structures of other leagues,  
12 etc., render any comparison between Zuffa fighter pay and the pay of other athletes in other sports  
13 "speculative at best."

14 Zuffa disputes that it waived work product protection for the challenged documents.  
15 Pursuant to Fed. R. Evid. 502(b) its inadvertent disclosure of the challenged documents does not  
16 operate as a waiver where (a) the disclosure is inadvertent; (b) the holder of the privilege took  
17 reasonable steps to prevent disclosure; and (c) the holder promptly took reasonable steps to rectify  
18 the error. Zuffa has produced over 641,000 documents, totaling over 2.6 million pages of materials  
19 in discovery in addition to the 108,000 documents that were produced to the FTC in 2011. In a  
20 document production of this magnitude, it is inevitable that documents may be inadvertently  
21 produced. This is the purpose of the protective order that was entered in this case that provides  
22 for claw back of inadvertently produced documents without waiver of the privilege.

23 Finally, Zuffa maintains the court should not consider plaintiff's motion challenging the  
24 documents at issue because counsel for plaintiffs failed to meet and confer in good faith before  
25 filing its motion to compel. Plaintiffs only sent counsel an August 24, 2016 letter stating, in general  
26 terms, they intended to challenge Zuffa's work product designation of the challenged documents,  
27 but did not request, nor did the parties conduct, a meet and confer. Had they done so, they would  
28 have learned about the erroneous assumptions underlying the motion. The reason Zuffa never

1 identified the potential or anticipated litigation involved in the challenged documents is because  
2 plaintiffs never asked Zuffa for the basis of its work product claim. For all of these reasons, the  
3 court should deny plaintiffs' motion.

#### 4 **C. Plaintiffs' Reply**

5 Plaintiffs reply that Zuffa's response has failed to establish a logical and necessary  
6 connection between the Mercer documents and the Alvarez litigation, or any other litigation Zuffa  
7 claims was anticipated at the time the Mercer documents were created. Additionally, Zuffa did  
8 not even disclose the Alvarez litigation in the list of litigations and disputes it provided in discovery  
9 in this case. The gravamen of the Alvarez litigation was that the UFC paid its fighters more than  
10 Bellator, who sued Alvarez to prevent him from fighting in the UFC for more money. Similarly,  
11 Zuffa has not shown that litigation from current or former fighters was fairly foreseeable at the  
12 time the documents were prepared or created. Its concerns that fighters might file suit regarding  
13 issues of fighter pay and enforceability of Zuffa's contracts do not constitute a credible threat of  
14 litigation. Similarly, inquiries from reporters and bloggers and fighters and their agents which  
15 related to typical business concerns do not meet Zuffa's burden of establishing a specific threat of  
16 litigation. Zuffa's explanation about reasonably foreseeable litigation which generated the Mercer  
17 documents is "exactly the type of generalized and un-specific threat of litigation that courts have  
18 deemed insufficient to establish work product protection." This case is too temporally remote  
19 from the creation of the Mercer documents to qualify as work product documents. No other  
20 litigation ever materialized and the work product doctrine does not apply to documents created in  
21 the ordinary course of business that later serve a litigation-related purpose.

22 The fighter pay assessment was commissioned after the Alvarez litigation settled. The fact  
23 that the documents may now have a litigation purpose, or are probative of the claims in this  
24 litigation, does mean that the documents were work product protected when they were created.  
25 Plaintiffs also argue that the challenged documents clearly serve dual business and litigation  
26 purposes. Work product protection is only afforded to documents that would not have been created  
27 in a substantially similar form but for the prospect of litigation. Zuffa concedes that Mercer  
28

1 proposed to perform virtually the same study before Zuffa's outside counsel allegedly  
2 recommended the study to prepare for unspecified "imminent litigation."

3 Plaintiffs have shown substantial need for the documents because plaintiffs complaint  
4 makes allegations that compare fighter pay in the UFC with other sports leagues, making these  
5 documents directly relevant and highly probative. The fact that similar evidence may be available  
6 does not cloak the material from production or discovery. Mercer's analysis is unique, and to  
7 plaintiffs' knowledge, the only type of analysis Zuffa performed comparing fighter pay to other  
8 sports leagues.

9 Plaintiffs also argue that Zuffa appears to have used the fighter pay assessment for non-  
10 legal purposes. Zuffa executives frequently compare UFC fighter and compensation to other  
11 sports. Specifically, in January 2015, Zuffa created a presentation entitled "Minimum Fighter Pay"  
12 which was produced in this case. The presentation reflects analysis of different pay scales for UFC  
13 fighters and the effect on UFC's total fighter compensation. This presentation makes it implausible  
14 that Zuffa did not use any information or data from the pay assessment performed by Mercer for  
15 business purposes.

16 The reply reiterates arguments that Plaintiffs have a substantial need for the documents  
17 because they directly address plaintiffs' allegation that Zuffa's pay structure harmed plaintiffs by  
18 suppressing their wages, and that UFC fighter pay compares unfavorably to the four major sports  
19 leagues that are part of the comparator group proposed by Mercer. Plaintiffs dispute that the  
20 Mercer presentation refers to documents publicly available. The proposal refers to the Form 990  
21 for the PGA and NFL, but for the rest of the categories "it is impossible to tell where Mercer got  
22 this information." The reply also reiterates arguments that Zuffa waived any work product  
23 protection for the challenged documents by failing to claw back the Mercer statement of work.

24 Finally, plaintiffs contend that the motion challenging work product was appropriately filed  
25 pursuant to the protective order entered in this case. A meet and confer would not have been  
26 productive to narrow the privilege dispute that concerns three documents "where the parties'  
27 positions are well understood."

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2           **D. Motions to Seal**

3           The motion, response, reply, and supporting exhibits and declarations filed on the public  
4 record were heavily redacted, and numerous motions to seal were filed requesting that redacted  
5 briefs, declarations and exhibits filed under seal remain redacted and sealed on the public record.  
6 Plaintiffs' motions to seal are based on their obligation to file documents produced in discovery  
7 which opposing counsel marked as confidential pursuant to the protective order and amended  
8 protective order governing confidentiality entered in this case. Defendants' motions to seal are  
9 based on arguments the redacted portions of the briefs and supporting declarations, and exhibits  
10 filed under seal, are confidential and entitled to protection from public disclosure on various  
11 grounds.

12           Hundreds of pages were filed in connection with the moving and responsive papers  
13 involved in this motion challenging work product protection. The court lacks the time and the  
14 resources to determine, on a line-by-line, page-by-page, and document-by-document basis whether  
15 the parties have shown good cause for each and every redaction and sealed document. The court  
16 finds that the documents filed on the public record, coupled with this detailed decision and order  
17 which explains the parties' disputes and the court's rationale for its decision, complies with the  
18 holdings of the Supreme Court and Ninth Circuit which create a presumption of public access to  
19 judicial files and records, and the good cause showing required for sealing documents. This is a  
20 non-dispositive motion, and the parties' motions, coupled with this detailed decision and order  
21 explaining the rationale for the court's order accomplishes the objective of providing public access.

22                           **DISCUSSION**

23           **I. Meet and Confer**

24           "Discovery is supposed to proceed with minimal involvement of the Court." *Cardoza v.*  
25 *Bloomin' Brands, Inc.*, No. 2:13-cv-01820-JAD-NJK, --- F. Supp. 3d. ----, 2015 WL 6123192, at  
26 \*6 (D. Nev. Oct. 16, 2015) (citing *F.D.I.C. v. Butcher*, 116 F.R.D. 196, 203 (E.D. Tenn. 1986)).  
27 Litigants and their counsel should strive to be cooperative, practical, and sensible, and should seek  
28

1 judicial intervention “only in extraordinary situations that implicate truly significant interests.” *Id.*  
2 (citing *In re Convergent Techs. Securities Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985)).

3 A threshold issue in the review of any discovery motion is whether the movant made  
4 adequate efforts to resolve the dispute without court intervention. Federal Rule of Civil Procedure  
5 37(a)(1) requires that the party bringing a discovery motion must “include a certification that the  
6 movant has in good faith conferred or attempted to confer with the person or party failing to make  
7 disclosure or discovery in an effort to obtain it without court action.” Similarly, Local Rule 26–  
8 7(c) provides that “[d]iscovery motions will not be considered unless the movant (1) has made a  
9 good-faith effort to meet and confer as defined by LR IA 1-3(f) before filing the motion, and (2)  
10 includes a declaration setting forth the details and results of the meet-and-confer conference about  
11 each disputed discovery conference.”

12 Judges in this district have held that “personal consultation” means the movant must  
13 “personally engage in two-way communication with the nonresponding party to meaningfully  
14 discuss each contested discovery dispute in a genuine effort to avoid judicial intervention.”  
15 *ShuffleMaster, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 171 (D. Nev. 1996). The  
16 consultation obligation “promote[s] a frank exchange between counsel to resolve issues by  
17 agreement or to at least narrow and focus matters in controversy before judicial resolution is  
18 sought.” *Nevada Power v. Monsanto*, 151 F.R.D. 118, 120 (D. Nev. 1993). To meet this  
19 obligation, parties must “treat the informal negotiation process as a substitute for, and not simply  
20 a formalistic prerequisite to, judicial resolution of discovery disputes.” *Id.* This is done when the  
21 parties “present to each other the merits of their respective positions with the same candor,  
22 specificity, and support during the informal negotiations as during the briefing of discovery  
23 motions.” *Id.* To ensure that parties comply with these requirements, movants must file  
24 certifications that “accurately and specifically convey to the court who, where, how, and when the  
25 respective parties attempted to personally resolve the discovery dispute.” *ShuffleMaster*, 170  
26 F.R.D. at 170. Courts may look beyond the certification made to determine whether a sufficient  
27 meet-and-confer actually took place. *See, e.g., F.D.I.C. v. 26 Flamingo, LLC*, 2013 WL 2558219,  
28



1 \*1 (D. Nev. June 10, 2013) (quoting *De Leon v. CIT Small Business Lending Corp.*, 2013 WL  
2 1907786 (D. Nev. May 7, 2013)).

3 Neither side complied with its meet-and-confer obligations before this motion was filed.  
4 Zuffa's claw back letter did not articulate a basis for its claim the documents were work product  
5 protected. It was Zuffa's burden, as the party claiming work product protection, to substantiate its  
6 claim of qualified privilege. Nothing in the record establishes that Zuffa even attempted to meet  
7 its burden until after this motion was filed. Zuffa did not list the documents on a privilege log  
8 before this motion was filed. A privileged document log was provided, for the first time, on April  
9 27, 2017, and logged approximately 30,000 documents. Plaintiff sent a letter indicating an  
10 intention to challenge Zuffa's claw back of the documents in dispute. Counsel for plaintiffs made  
11 no effort to genuinely try to resolve the parties' dispute without court intervention. The meet and  
12 confer process would, at a minimum, have clarified and narrowed the issues. However, it is  
13 apparent that no amount of meet and confer would have resolved the parties' current dispute.  
14 Judicial intervention was inevitable. Rather than deny the motion on the parties' failure to comply  
15 with their meet-and-confer obligations, the court will decide the matter on the merits to avoid  
16 further delay and interruption with already protracted pretrial litigation proceedings in this case.

## 17 **II. The Work Product Doctrine**

18 The work product doctrine is a "qualified privilege" that protects "certain materials  
19 prepared by an attorney acting for his client in anticipation of litigation." *United States v. Nobles*,  
20 422 U.S. 225, 237–38 (1975) (internal quotation omitted) ("At its core the work-product doctrine  
21 shelters the mental processes of the attorney, providing a privileged area within which he can  
22 analyze and prepare his client's case."). The work product doctrine is codified in Rule 26(b)(3)  
23 and it protects "from discovery documents and tangible things prepared by a party or his  
24 representative in anticipation of litigation." *In re: Grand Jury Subpoena*, 357 F.3d 900, 906 (9th  
25 Cir. 2004), (citing *Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1494 (9th Cir.  
26 1989)). An adverse party may obtain documents protected by the work product privilege only  
27 upon a showing of substantial need and undue hardship in obtaining the substantial equivalent of  
28 the materials by other means. Fed. R. Civ. P. 26(b)(3).

1           The Ninth Circuit has held that to qualify for work product protection under Rule 26(b)(3),  
2 the documents must: (1) be prepared in anticipation of litigation or for trial; and (2) be prepared  
3 by or for another party, or by or for that other party's representative. *In re: Grand Jury Subpoena*,  
4 357 F.3d at 907. The Ninth Circuit refers to documents prepared exclusively "in anticipation of  
5 litigation" as "single purpose" documents. *Id.*

6           Plaintiffs claim that the documents in dispute are ordinary business documents which are  
7 not protected by the work product doctrine, or at most, "dual purpose" documents. The Ninth  
8 Circuit has adopted the "because of" standard articulated by Wright and Miller in applying the  
9 work product doctrine to dual purpose documents. *Id.* Under this standard, documents should be  
10 deemed prepared "in anticipation of litigation" for purposes of qualified work product protection  
11 under Rule 26(b)(3) if "in the light of the nature of the documents and the factual situation in the  
12 particular case, the documents can be fairly said to have been prepared or obtained because of the  
13 prospect of litigation." *Id.* quoting *The Late Charles Alan Wright, Arthur R. Miller, and Richard*  
14 *L. Marcus, 8 Federal Practice and Procedure* § 2024 (2d ed. 1994). This standard "does not  
15 consider whether litigation was a primary or secondary motive" for creation of the document. *Id.*  
16 at 908. Rather, the court examines the totality of the circumstances and affords work product  
17 protection if it finds the "document was created because of anticipated litigation, and would not  
18 have been created in substantially similar form but for the prospect of that litigation." *Id.* quoting  
19 *United States v. Aldman*, 134 F.3d 1194, 1195 (2nd Cir. 1998). "When there is a true independent  
20 purpose for creating a document, work product protection is less likely, but when two purposes  
21 are profoundly interconnected, the analysis is more complicated." *Id.*

22           It is undisputed that the Mercer documents were not prepared in anticipation of this case.  
23 The documents were created many months before the complaint in this case was filed. Zuffa does  
24 not claim that the documents are entitled to protection as dual-purpose documents. Rather, it  
25 claims the documents are single purpose documents prepared by a representative of outside  
26 counsel in anticipation of litigation.

27           Zuffa claims that it anticipated litigation with Bellator and MMA fighters because of a  
28 lawsuit filed in the District of New Jersey in January 2013 by Bellator, a rival MMA promoter,

1 against Eddie Alvarez, a fighter under contract with Bellator. The complaint in that case alleged  
2 that Eddie Alvarez had breached his contract with Bellator by negotiating with Zuffa before his  
3 contractual obligations to Bellator were concluded. The complaint also asserted tortious  
4 interference with contract claims against unserved Doe defendants. Zuffa's opposition claims that  
5 because Zuffa was negotiating with Alvarez "its outside counsel believed there was a high  
6 likelihood that Zuffa could be named in the lawsuit as one of the Doe defendants." Zuffa received  
7 a non-party subpoena duces tecum and Campbell & Williams engaged in a "number of interactions  
8 with Bellator's counsel." Thus, Zuffa argues, the Bellator/Alvarez lawsuit led outside counsel to  
9 subjectively and objectively believe that litigation with Bellator over Mr. Alvarez was a reasonably  
10 foreseeable possibility.

11 Zuffa claims outside counsel commissioned the fighter pay assessment study to assess its  
12 exposure in the Alvarez litigation and "attendant allegations" from fighters regarding their  
13 compensation, and the enforceability of Zuffa's standard fighter contract. Zuffa does not explain,  
14 and the court cannot discern, how the fighter pay assessment study would assist outside counsel in  
15 assessing Zuffa's potential exposure to Bellator in a potential tortious interference with the  
16 Alvarez/Bellator contract claim. Additionally, Zuffa has not identified a single threat of litigation  
17 from a fighter, fighter representative, or any other party. Public statements by fighters, their  
18 representatives, and members of the press questioning the fairness of Zuffa fighter compensation  
19 and contract terms simply do not amount to the threat of reasonably foreseeable litigation.

20 The court finds that Zuffa has not shown that in the light of the nature of the disputed  
21 documents themselves, and the totality of the circumstances at the time the documents were  
22 prepared, that the documents were prepared because of reasonably foreseeable litigation. It is  
23 undisputed that Zuffa hired Mercer, an HR consulting company, to conduct a non-fighter pay  
24 assessment study in March 2013. Zuffa's opposition claims that after that study was completed,  
25 Mercer proposed a fighter pay assessment study.

26 The Hendricks declaration submitted in support of Zuffa's opposition states that in March  
27 2013, Zuffa engaged Mercer to perform a study of Zuffa employee compensation. Zuffa  
28 Opposition (ECF Nos. 294, 295), Hendricks declaration ¶ 2. The study did not involve fighters

1 under contract with Zuffa. *Id.* After Mercer completed the compensation study, Mercer proposed  
2 a new study regarding fighter pay compensation. *Id.* ¶ 3. On August 8, 2013, Cathy Shepard sent  
3 Zuffa CEO Lorenzo Fertitta a draft Statement of Work-Fighter Pay Program Review and Design.  
4 *Id.* Mr. Hendricks attests that Zuffa never retained Mercer to do the proposed study because there  
5 was no “business purpose significant enough to justify” it. *Id.* ¶ 4. Because of ongoing litigation  
6 between Bellator and Alvarez “Zuffa put a litigation hold on potentially relevant documents” on  
7 May 3, 2013. *Id.* ¶ 5.

8 Zuffa claims that outside counsel, Campbell & Williams, became aware of the Mercer  
9 proposal, and decided to commission the study to assist in potential litigation with Bellator arising  
10 out of the Bellator/Alvarez case. Zuffa’s Opposition, Campbell Declaration. Hunter Campbell’s  
11 declaration attests that in August 2013, the firm learned that Bellator and Alvarez reached a  
12 settlement of the Alvarez litigation. *Id.* ¶ 6. The firm did not know the terms of the settlement  
13 agreement, but subsequently became aware of at least some of the terms. *Id.* The settlement  
14 agreement contained a unique clause that provided, inter alia, that any negotiations between  
15 Alvarez and Zuffa were to be kept strictly confidential and subject to a written confidentiality  
16 agreement that was approved by Bellator. *Id.* The law firm believed litigation with Bellator  
17 regarding Alvarez was likely even after the settlement. *Id.* ¶ 7. There were difficulties with  
18 Bellator concerning Alvarez between February 2014, and August 2014. *Id.* ¶ 7.

19 The publication of Zuffa’s contract in the New Jersey litigation generated a significant  
20 amount of media interest and public scrutiny over Zuffa’s compensation to fighters and the terms  
21 of its agreements. *Id.* ¶ 9. Zuffa and the law firm began receiving numerous inquiring from  
22 reporters and bloggers, fighters, and their agents. *Id.* The declaration provides specific examples  
23 of inquiries and public commentary in paragraph 10. “The significant public fallout from the  
24 disclosure of Zuffa’s contract made Campbell & Williams believe that litigation from a fighter  
25 regarding Zuffa’s compensation or the enforceability of Zuffa’s contract provisions was likely to  
26 occur in the near future.” *Id.* ¶ 7. This led to discussions with Zuffa executives. *Id.* ¶ 12. From  
27 discussions with Zuffa executives the firm learned that Mercer “had pitched a product regarding  
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1 Zuffa's fighter pay and an assessment of the pay and benefits of Zuffa's fighters in comparison to  
2 other athletes in sports organizations." *Id.*

3 Campbell & Williams engaged Mercer in its role as outside counsel on September 25,  
4 2013, and paid Mercer directly for its services, believing Mercer's work would be helpful to shape  
5 litigation strategies in anticipation of lawsuits with Bellator regarding Alvarez and fighters under  
6 contract with the UFC. *Id.* Mr Campbell avers that "[t]o my knowledge the Mercer study was not  
7 commissioned for any business purpose, and I am not aware of anyone at Zuffa using it for a  
8 business purpose." *Id.* ¶ 14. The firm would not have commissioned the study but for anticipated  
9 litigation. *Id.* After the firm engaged Mercer on September 25, 2013, Hunter coordinated as  
10 needed with Zuffa employees to collect data for the study. *Id.* ¶ 15. Ultimately, the study was not  
11 completed "as Mercer, by its own admission, lacked adequate statistical information to complete  
12 the study, particularly as it related to other combat sports and smaller sports organizations." *Id.*

13 The court does not doubt the representations made by Campbell & Williams that it directly  
14 commissioned the study and paid for it. However, it is clear that the Mercer fighter pay assessment  
15 proposal followed closely on the heels of work Mercer did for Zuffa exclusively for business  
16 purposes. Zuffa also contends that the Mercer proposal was unsolicited, and that when Campbell  
17 & Williams learned about the proposal in September 2013, the firm decided it would be helpful to  
18 prepare for potential litigation with Bellator and fighters under contract with Zuffa.

19 The court finds these arguments unpersuasive. A plain reading of the documents  
20 themselves does not support Zuffa's arguments that the fighter pay assessment proposal was  
21 unsolicited. The August 8, 2013 Mercer statement of work for a proposed fighter pay program  
22 review and design which was addressed to Zuffa's CEO, Lorenzo Fertitta, and refers to an  
23 engagement letter containing terms and conditions dated March 3, 2013. Opposition (ECF No  
24 294/295), Exhibit K. Zuffa does not claim this document is work product, characterizing it as a  
25 rejected business proposal. The August 9, 2013 email from Cathy Shepard of Mercer to Mr.  
26 Fertitta and others with Zuffa refers to an attached proposal prepared by Howard Levine and  
27 Shepard "per your request" for "designing a compensation and benefits approach for your  
28 Fighters." *Id.*, Exhibit J. A follow up email was sent to Mr. Fertitta and Lawrence Epstein inquiring

1 whether they had reviewed the fighter pay proposal, had any questions or wanted to schedule a  
2 call to discuss it. *Id.*, Exhibit L. The statement of work describes the proposed “Fighter Pay Review  
3 and Design.” Its goal was to “not only help test the alignment of current fighter compensation and  
4 benefits practices against UFC strategies and market practices, but also identify potential  
5 opportunities for change.” The context in which the documents were created, on the heels of a  
6 non-fighter pay assessment study, the references to requests made for the proposal by Mr. Fertitta,  
7 and the description of the purpose of the proposed study suggest a business rather than legal  
8 purpose.

9       Nothing in the record suggests that Zuffa had been threatened with a lawsuit over fighter  
10 compensation at the time Mercer made its proposal, or at the time Campbell & Williams  
11 commissioned the study. Additionally, Zuffa does not articulate how a fighter pay assessment  
12 study would be useful in potential litigation with Bellator over the Eddie Alvarez contract  
13 negotiations. The District of New Jersey case involved a contract dispute between a rival promotor  
14 and a fighter under contract with that rival MMA promoter. It was filed in January 2013, and  
15 settled in August 2013. Bellator sued Alvarez for breach of contract to preclude Alvarez from  
16 negotiating with Zuffa, while he was still under contract with Bellator. Bellator’s potential tortious  
17 interference claim involved allegations unidentified parties were interfering with the  
18 Bellator/Alvarez contract. Zuffa does not explain how a fighter pay program review and design  
19 study is work product linked to Bellator’s potential tortious interference claim against it.

20       Moreover, the three disputed documents do not contain any indication on their face that  
21 they were prepared by or at the request of outside counsel. This is probably why litigation counsel  
22 who produced the documents did not recognize that they were potentially covered by qualified  
23 work product protection. No attempt was made to claw back the documents for months, even  
24 though counsel for both sides were meeting and conferring about Rule 30(b)(6) deposition topics,  
25 including on the subject matter discussed in the Mercer documents. Nothing in the documents  
26 themselves contain the mental impressions, conclusions, opinions, or legal theories of counsel.

27       It is now well settled that the work product doctrine is an intensely practical one that  
28 protects materials prepared by attorneys and their agents in anticipation of litigation. *Nobles*, 422

1 U.S. at 2170. The court finds that Zuffa has not established that the Mercer documents in dispute  
2 in this motion were prepared in anticipation of reasonably foreseeable litigation. At most, Zuffa  
3 has shown that the Bellator/Alvarez lawsuit generated a great deal of interest in the MMA industry  
4 about Zuffa's fighter compensation, and that Zuffa and its outside counsel, Campbell & Williams,  
5 were receiving numerous inquiries about the New Jersey lawsuit and Zuffa's compensation of its  
6 fighters.

7 The timing and context of the creation of the documents lead the court to conclude they  
8 were created in response to a public relations problem, or what Mr. Campbell's declaration  
9 describes as "the significant public fallout from the disclosure of the Zuffa contract" in the New  
10 Jersey litigation. The documents themselves contain references to a business purpose for  
11 comparing fighter compensation of UFC athletes with that of athletes in other sports—"designing  
12 a compensation and benefits approach for your Fighters" with the goal of the study to "not only  
13 help test the alignment of current fighter compensation and benefits practices against UFC's  
14 strategies and market practices, but also identify potential opportunities for change." There is  
15 simply no support in the record that litigation over Zuffa's fighter compensation practices was  
16 threatened at the time the documents were created. Zuffa has shown that there was a great deal  
17 media interest and public scrutiny, "significant public fallout" and expressions of frustration and  
18 dissatisfaction over fighter pay and contract terms as a result off the disclosure Zuffa documents  
19 in the Alvarez litigation in New Jersey. This is insufficient to meet its burden of establishing the  
20 Mercer documents in dispute were prepared in anticipation of litigation.

21 The documents were prepared in the context of a follow up to a non-fighter compensation  
22 study Zuffa acknowledges it conducted for a business purpose. Zuffa does not claim that any  
23 fighter, fighter representative, or anyone else actually threatened litigation over Zuffa's  
24 compensation to fighters or the enforceability of Zuffa's fighter contract. It is obvious how the  
25 proposed fighter pay program review and design study would be useful in contract negotiations  
26 with fighters and their agents, and to respond to industry criticism. Zuffa has not shown how the  
27 disputed documents would help outside counsel analyze a potential tortious interference claim by  
28 Bellator.

1 Because the court has found that Zuffa has not met its burden of establishing that the three  
2 disputed documents involved in this motion are protected by the qualified work product privilege,  
3 the court need not determine whether plaintiffs have shown substantial need for the documents, or  
4 that plaintiffs cannot obtain their substantial equivalent without undue burden.

### 5 **III. Waiver**

6 Unlike the attorney-client privilege, which is waived by voluntary disclosure, the work  
7 product privilege is not waived unless voluntary disclosure “has substantially increased the  
8 opportunities for potential adversaries to obtain the information.” *Goff v. Harris Operating Co.,*  
9 *Inc.*, 240 F.R.D. 659 (2007) (citing Charles A. Wright, Arthur R. Miller & Richard L. Moore,  
10 *Federal Practice & Procedure: Civil 2d* § 2024 (1994) at 369 & n.52). Thus, one may waive the  
11 attorney-client privilege without waiving the work-product privilege. *Id.* (citing Wright & Miller  
12 and *In re: EchoStar Communications*, 448 F.3d 1294, 1301 (Fed. Cir. 2006)). In *EchoStar*, the  
13 Federal Circuit held that “work product waiver is not a broad waiver of all work product related to  
14 the same subject matter like the attorney-client privilege.” 448 F.3d at 1301. (citation omitted).  
15 Rather, waiver of work product only extends to the “factual” or “non-opinion” work product  
16 concerning the same subject matter as the disclosed work product. *Id.*, citing *Nobles*, 422 U.S. at  
17 239.

18 As Wright & Miller explain, the purpose of the attorney-client privilege is to protect  
19 confidential communications. The purpose of the privilege ceases to exist if the communications  
20 are voluntarily disclosed to a third person. *Federal Practice & Procedure*, 3d § 2024 at 531.  
21 However, the purpose of the work product rule is to protect evidence from the knowledge of  
22 opposing counsel and his client, thereby preventing its use against the lawyer gathering the  
23 materials. *Id.* Work product protection is only waived with respect to matters disclosed.  
24 *Hernandez v. Tanninem*, 604 F.3d 1095, 1100 (9th Cir. 2010) (holding district court erred in  
25 finding blanket waiver of attorney-client and work-product privilege as to entire case file of former  
26 attorney, and finding work-product waiver only as to the subject of former attorney’s  
27 communications with witness produced in evidence in opposition to defense motion for summary  
28 judgment).



1 As the court reasoned in *Goff v. Harrah's*, 240 F.R.D. 659, 662 (D. Nev. 2007)

2 A per se rule against partial disclosure of work product would force a choice  
3 between improperly concealing facts contained in work product that should be  
4 revealed, or revealing the entirety of trial preparation documents even though the  
5 documents contain opinions to which the other party is not entitled. The work  
product privilege is 'intensely practical' [citation omitted] and does not compel  
such a result.

6 Zuffa only recently produced a privileged document log on April 27, 2017, on which  
7 approximately 30,000 documents have been logged. At the June 1, 2017 hearing, the court  
8 declined to rule on counsel for plaintiffs' oral request to deem work product privilege waived with  
9 respect to all of the Mercer documents listed on the privilege log. The court has not seen the  
10 privileged document log, has no idea whether Zuffa complied with its obligations under Rule  
11 26(b)(2)(5) to justify its privileged designations, and expresses no opinion about whether there are  
12 Mercer documents which may be appropriately withheld as privileged. The parties must  
13 meaningful meet and confer before requesting judicial intervention on the propriety of disputed  
14 privilege log designations. However, the court finds that Zuffa has waived work product  
15 protection for documents containing the facts and non-opinion work product on which Mercer  
16 relied on in conducting its proposed study, and any documents containing or discussing Mercer's  
17 findings, conclusions, and recommendations in connection with its proposed fighter pay  
18 assessment study.

19 **IT IS ORDERED** that:


- 20 1. Plaintiffs' Motion to Challenge Work Product Designation (ECF Nos. 281, 282) is  
21 **GRANTED** and Zuffa shall produce the three disputed documents.
- 22 2. Zuffa shall also produce all documents containing the facts and non-opinion work  
23 product on which Mercer relied on in conducting its proposed study, and any  
24 documents containing or disclosing Mercer's findings, conclusions, and  
25 recommendations in connection with its proposed fighter pay program review and  
26 design/fighter pay assessment study.

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3. The parties’ Motions to Seal (ECF Nos. 296, 298, 305, 308, 310) related to this motion  
are **GRANTED**.

DATED this 9th day of June, 2017.

  
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PEGGY A. LEEN  
UNITED STATES MAGISTRATE JUDGE